

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
RICHARD A. ROTH and NELIDA ROTH,

08 CV 5649 (JES)(GWG)

Plaintiffs,

**VERIFIED ANSWER**

-against-

DELTA AIR LINES, INC. and RALPH DAMOUR,

Defendants.  
-----X

The Defendant, RALPH DAMOUR ("DAMOUR"), answering the Complaint of RICHARD A. ROTH and NELIDA ROTH ("Plaintiffs") by his attorneys Quirk and Bakalor, P.C., respectfully alleges the following upon information and belief:

**PARTIES**

1. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "1" of the Plaintiff's Complaint and respectfully refers all matters of law contained therein to the Court.

2. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "2" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

3. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "3" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

4. Admits the allegations contained in paragraph numbered "4" of the Plaintiffs' Complaint.

FACTS

5. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "5" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

6. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "6" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

7. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "7" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

8. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "8" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

9. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "9" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

10. Denies the allegations contained in the paragraph numbered "10" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court, except admits advising the Plaintiffs, in sum and substance, that the flight had been dispatched.

11. Denies the allegations contained in the paragraph numbered "11" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court, except admits advising the Plaintiffs, in sum and substance, that the flight had been dispatched.

12. Denies the allegations contained in the paragraph numbered "12" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court, except admits advising the Plaintiffs, in sum and substance, that the flight had been dispatched.

13. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "13" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

14. Denies the allegations contained in the paragraph numbered "14" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

15. Denies the allegations contained in the paragraph numbered "15" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court, except admits advising the Plaintiffs, in sum and substance, that the flight had been dispatched.

16. Denies the allegations contained in the paragraph numbered "16" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

17. Denies the allegations contained in the paragraph numbered "17" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

18. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "18" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

19. Denies the allegations contained in the paragraph numbered "19" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

20. Denies the allegations contained in the paragraph numbered "20" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

21. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "21" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

22. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "22" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

23. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "23" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

24. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "24" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

25. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "25" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

26. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "26" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

27. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "27" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

28. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "28" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

29. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "29" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

30. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "30" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

31. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "31" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

32. Denies the allegations contained in the paragraph numbered "32" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

33. Denies the allegations contained in the paragraph numbered "33" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

34. Denies the allegations contained in the paragraph numbered "34" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

35. Denies the allegations contained in the paragraph numbered "35" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

36. Denies the allegations contained in the paragraph numbered "36" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

37. Denies the allegations contained in the paragraph numbered "37" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

**AS AND FOR AN ANSWER TO THE FIRST CAUSE OF ACTION  
FOR BREACH OF CONTRACT**

38. Repeats, reiterates and realleges each and every admission and denial as is contained herein in response to the allegations contained in the paragraphs numbered "1" through "38" of the Plaintiffs' Complaint.

39. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "39" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

40. Denies the allegations contained in the paragraph numbered "40" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

41. Denies the allegations contained in the paragraph numbered "41" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

**AS AND FOR AN ANSWER TO THE SECOND CAUSE OF ACTION  
BREACH OF GOOD FAITH AND FAIR DEALING**

42. Repeats, reiterates and realleges each and every admission and denial as is contained herein in response to the allegations contained in the paragraphs numbered "1" through "42" of the Plaintiffs' Complaint.

43. Denies the allegations contained in the paragraph numbered "43" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

44. Denies the allegations contained in the paragraph numbered "44" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

45. Denies the allegations contained in the paragraph numbered "45" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

46. Denies the allegations contained in the paragraph numbered "46" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

**AS AND FOR AN ANSWER TO THE THIRD CAUSE OF ACTION  
NEGLIGENCE AND GROSS NEGLIGENCE**

47. Repeats, reiterates and realleges each and every admission and denial as is contained herein in response to the allegations contained in the paragraphs numbered "1" through "47" of the Plaintiffs' Complaint.

48. Denies knowledge and information sufficient to form a belief as to the allegations contained in the paragraph numbered "48" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

49. Denies the allegations contained in the paragraph numbered "49" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

50. Denies the allegations contained in the paragraph numbered "50" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

51. Denies the allegations contained in the paragraph numbered "51" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

**AS AND FOR AN ANSWER TO THE FOURTH CAUSE OF ACTION  
NEGLIGENT MISREPRESENTATION**

52. Repeats, reiterates and realleges each and every admission and denial as is contained herein in response to the allegations contained in the paragraphs numbered "1" through "52" of the Plaintiffs' Complaint.



53. Denies the allegations contained in the paragraph numbered "53" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

54. Denies the allegations contained in the paragraph numbered "54" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

55. Denies the allegations contained in the paragraph numbered "55" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

**AS AND FOR AN ANSWER TO THE FIFTH CAUSE OF ACTION  
FRAUDULENT MISREPRESENTATION**

56. Repeats, reiterates and realleges each and every admission and denial as is contained herein in response to the allegations contained in the paragraphs numbered "1" through "56" of the Plaintiffs' Complaint.

57. Denies the allegations contained in the paragraph numbered "57" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

58. Denies the allegations contained in the paragraph numbered "58" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

59. Denies the allegations contained in the paragraph numbered "59" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

**AS AND FOR AN ANSWER TO THE SIXTH CAUSE OF ACTION  
INTENTIONAL TORT**

60. Repeats, reiterates and realleges each and every admission and denial as is contained herein in response to the allegations contained in the paragraphs numbered "1" through "60" of the Plaintiffs' Complaint.

61. Denies the allegations contained in the paragraph numbered "61" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.



62. Denies the allegations contained in the paragraph numbered "62" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

63. Denies the allegations contained in the paragraph numbered "63" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

**AS AND FOR AN ANSWER TO THE SEVENTH CAUSE OF ACTION  
IMPLIED CONTRACT**

64. Repeats, reiterates and realleges each and every admission and denial as is contained herein in response to the allegations contained in the paragraphs numbered "1" through "64" of the Plaintiffs' Complaint.

65. Denies the allegations contained in the paragraph numbered "65" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

66. Denies the allegations contained in the paragraph numbered "66" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

67. Denies the allegations contained in the paragraph numbered "67" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

68. Denies the allegations contained in the paragraph numbered "68" of the Plaintiffs' Complaint and respectfully refers all matters of law contained therein to the Court.

**AS AND FOR A FIRST DEFENSE**

69. The Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

**AS AND FOR A SECOND DEFENSE**

70. The Plaintiffs' action arises under a treaty of the United States, the Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, reprinted

in S. Treaty Doc. No. 106-45, 1999 WL 33292734 (2000) ("Montreal Convention"), or its predecessor treaty, the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), note following 49 U.S.C. § 40105 ("Warsaw Convention"). The Montreal Convention (or Warsaw Convention) exclusively governs the Plaintiffs' rights and remedies in this action, and preempts the common law claims alleged in the Plaintiffs' Complaint.

**AS AND FOR A THIRD DEFENSE**

71. The Defendant, Ralph Damour, avails himself of all defenses available to him under the Montreal Convention (or Warsaw Convention) including, but not limited to, the defenses set forth in Article 19.

**AS AND FOR A FOURTH DEFENSE**

72. That if any of Plaintiffs' claims relate to rates, routes or services as set forth in the 1978 Airlines Deregulation Act, 49 U.S.C. § 41713(b)(1), then Plaintiffs' claims are preempted by same.

**AS AND FOR A FIFTH DEFENSE**

73. The Federal Aviation Act of 1958, P.L. 85-726, 72 Stat. 731, 49 U.S.C. §§ 40101 *et seq.*, and the regulations promulgated thereunder implicitly preempt any State law standard that purports to govern aviation safety, equipment, and operational standards.

**AS AND FOR A SIXTH DEFENSE**

74. The Plaintiff's claims may be barred, in whole or in part, by the doctrines of waiver, estoppel, laches and/or unclean hands.

**AS AND FOR A SEVENTH DEFENSE**

75. The Plaintiffs may have failed to mitigate their damages.

**AS AND FOR AN EIGHTH DEFENSE**

76. The actions or omissions of the Defendant, Ralph Damour, are not the proximate cause of any injury or damages allegedly sustained by Plaintiffs.

**AS AND FOR A NINTH DEFENSE**

77. The Plaintiffs' alleged damages were caused by the unforeseeable, intervening and/or superseding acts of third parties for which the Defendant, Ralph Damour, is not responsible.

**AS AND FOR A TENTH DEFENSE**

78. That if any of the injuries or damages allegedly sustained by the Plaintiffs were caused in whole or in part by the culpable conduct of, and/or assumption of risk by Plaintiffs, then the Defendant, Ralph Damour, respectfully demands that the amount of damages which may be recoverable by Plaintiffs be diminished in the proportion which Plaintiffs' culpable conduct and/or assumption of risk bears to the culpable conduct which caused the damages.

**AS AND FOR AN ELEVENTH DEFENSE**

79. Pursuant to Article 16 of New York Civil Procedure Law and Rules the Defendant, Ralph Damour, hereby demands that the liability, if any, of the Defendant be limited to the equitable share of the Defendant determined in accordance with the relative culpability of each and every party or non-party, causing or contributing to the total liability for non-economic loss. If Defendant's liability is found to be fifty percent or less of total liability

assigned to all liable persons due to the Plaintiffs' failure to join a necessary tortfeasor, the Plaintiff's non-economic recovery shall be limited to the percentage of Defendant's liability.

**AS AND FOR A TWELFTH DEFENSE**

80. Any past or future cost or expense incurred or to be incurred by the Plaintiffs for medical care, dental care, custodial care or rehabilitative services, loss of earnings or other economic loss, was or will be within reasonable certainty be replaced or indemnified in whole or in part for collateral sources such as defined in Section 4545(c) of the New York Civil Practice Law and Rules and, if any, damages are recoverable against the answering Defendant, the amount of such damages shall be reduced by the amount of benefits which the Plaintiff has or will receive from such collateral source.

**AS AND FOR A THIRTEENTH DEFENSE**

81. That the use of State law to contradict or supplement federal aviation legislation and the regulations promulgated thereunder would be an unconstitutional burden on interstate air commerce.

The Defendant, Ralph Damour, hereby reserves the right to add additional defenses as based on information obtained during investigation or discovery. Nothing contained herein shall be deemed to impose upon Defendant any burden of proof not imposed by applicable substantive law.

**WHEREFORE**, the Defendant, Ralph Damour, demands judgment dismissing the Plaintiffs' Complaint together with such costs and disbursements of this action, plus all attorneys' fees and all other costs herein.

Dated: New York, New York  
August 15, 2008

QUIRK AND BAKALOR, P.C.

By: Brian P. Sexton  
Brian P. Sexton, Esq. (BPS 2883)  
*Attorneys for Defendant*  
RALPH DAMOUR  
845 Third Avenue, 15<sup>th</sup> Floor  
New York, New York 10022  
(212) 319-1000

TO: Richard A. Roth, Esq.  
Jordan M. Kam, Esq.  
*Attorneys for Plaintiffs*  
THE ROTH LAW FIRM, PLLC  
545 Fifth Avenue, Suite 960  
New York, New York 10017  
(212) 542-8882

**ATTORNEY VERIFICATION**

BRIAN P. SEXTON, an attorney admitted to practice in the courts of the State of New York hereby affirms under the penalties of perjury:

I am a member of the law firm QUIRK AND BAKALOR, P.C., attorneys for defendant, **RALPH DAMOUR.**

I have read the foregoing **VERIFIED ANSWER** and know the contents thereof to be true, to my knowledge, except as to those matters alleged to be upon information and belief, which matters I believe to be true.

This verification is made by your affiant because defendant resides outside of the county in which your affiant's office is located.

Dated: New York, New York  
August 15, 2008

  
\_\_\_\_\_  
BRIAN P. SEXTON, ESQ.

Check Applicable Box

☐ **Witnessed By Attorney**

☐ **Attorney's Affirmation**

has been compared by me with the original and found to be a true and complete copy.

state that I am the attorney(s) of record for action; I have read the foregoing and know the contents thereof; the same is true to my own knowledge, except as to the matters therein alleged to be on information and belief, and as to those matters I believe it to be true. The reason this verification is made by me and not by

in the within

The grounds of my belief as to all matters not stated upon my own knowledge are as follows:

I affirm that the foregoing statements are true, under the penalties of perjury.

Dated: \_\_\_\_\_ The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

I, the undersigned, being duly sworn, depose and say: I am

☐ **Individual Verification**

in the action; I have read the foregoing

and know the contents thereof; the same is true to my own knowledge, except

☐ **Corporate Verification**

as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

the of a

corporation and a party in the within action; I have read the foregoing

and know the contents thereof; and the same is true to my own knowledge,

except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true. This verification is made by me because the above party is a corporation and I am an officer thereof.

The grounds of my belief as to all matters not stated upon my own knowledge are as follows:

Sworn to before me on

\_\_\_\_\_ The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF New York

ss.:

(If more than one box is checked—indicate after names type of service used.)

I, the undersigned, being sworn, say: I am not a party to the action, am over 18 years of age and reside at Bronx, N.Y.

August 15, 2008

Verified Answer

OR X

Check Applicable Box

☐ **Service By Mail**

☐ **Personal Service on Individual**

☐ **Service by Electronic Means**

☐ **Overnight Delivery Service**

I served the within

by mailing a copy to each of the following persons at the last known address set forth after each name below.

by delivering a true copy of each personally to each person named below at the address indicated. I knew each person served to be the person mentioned and described in said papers as a party therein:

by transmitting a copy to the following persons by ☐ FAX at the telephone number set forth after each name below ☐ E-MAIL at the E-Mail address set forth after each name below, which was designated by the attorney for such purpose, and by mailing a copy to the address set forth after each name.

by dispatching a copy by overnight delivery to each of the following persons at the last known address set forth after each name below.

Richard A. Roth, Esq.

Jordan M. Kam, Esq.

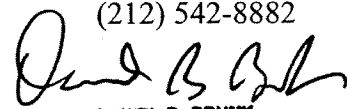
Attorneys for Plaintiffs

THE ROTH LAW FIRM, PLLC

545 Fifth Avenue, Suite 960

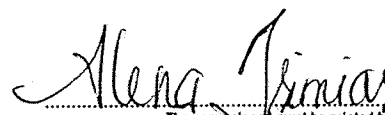
New York, New York

(212) 542-8882

  
**DANIEL B. BRUNK**  
 Notary Public, State of New York  
 No. 02BR6183647  
 Qualified in New York County  
 Commission Expires March 17, 2017

Sworn to before me on

August 15, 2008



\_\_\_\_\_ The name signed must be printed beneath

Alena Trimiari



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

08 CV-5649 (JES)(GWG)

RICHARD A. ROTH and NELIDA ROTH,

Plaintiff,

-against-

DELTA AIR LINES, INC. and RALPH DAMOUR,

Defendant.

**VERIFIED ANSWER****QUIRK AND BAKALOR, P.C.**

Defendant

*Attorney(s) for* RALPH DAMOUR*Office and Post Office Address, Telephone*845 Third Avenue  
NEW YORK, NEW YORK 10022  
(212) 319-1000

To

Signature (Rule 130-1.1-a)

\_\_\_\_\_  
Print name beneath

Service of a copy of the within is hereby admitted.

Attorney(s) for

Dated: \_\_\_\_\_

**PLEASE TAKE NOTICE:**☐ NOTICE OF ENTRYthat the within is a (*certified*) true copy of a  
duly entered in the office of the clerk of the within named court on☐ NOTICE OF SETTLEMENTthat an order  
will be presented for settlement to the HON.  
within named Court, at

on

at

M.

Dated,

of which the within is a true copy  
one of the judges of the

Yours, etc.

**QUIRK AND BAKALOR, P.C.**